

May 6, 2011

Phil Isenberg, Chairman
Delta Stewardship Council
980 Ninth Street, Suite 1500
Sacramento, CA 95814

Dear Mr. Isenberg:

The Delta Stewardship Council's efforts to respond to comments on the successive drafts of the Delta Plan are commendable. The East Bay Municipal Utility District (EBMUD) appreciates the opportunity to offer specific comments on the April 22, 2011 "Third Staff Draft Delta Plan." In response to your requests, we have offered specific language changes and explanatory comments in the attachment to this letter.

We would like to highlight two specific concerns with the Third Draft Plan. First, its description of "Current Conditions" on page 9 needs to be clear and accurate. As currently written, it will confuse the readers as to where and how water is diverted. The section suggests that "*numerous pipes and canals that carry water from east to west in isolation*" are responsible for as much as a 30 percent reduction in Delta flows. EBMUD has seen similar inaccurate information in other documents, and we believe it is very important that corrections are made here and anywhere else. As written, the section implies that the Mokelumne and Hetch Hetchy Aqueducts are responsible for as much as a 30 percent reduction in Delta inflows. We have provided specific edits to correct this information to reflect that these two conveyance systems combined divert only 1.3 percent of water from the watershed (see page 1 of the attachment to this letter).

The second topic of particular concern that we urge be addressed is to describe the geographic scope of the Delta Plan in a manner consistent with the statutory requirements, including Section 85302(b) of the Sacramento-San Joaquin Delta Reform Act, which states "*The geographic scope of the ecosystem restoration projects and programs identified in the Delta Plan shall be the Delta, except that the Delta Plan may include recommended ecosystem projects outside the Delta that will contribute to achievement of the coequal goals.*" The language in the Third Draft regarding both the scope of the Delta Plan and the scope of the covered actions does not accurately state the Legislature's intended scope of the Delta Plan and its regulatory effect.

We look forward to continuing our support for your effort to develop a broadly supported and effective Delta Plan. If you have any questions, please contact Doug Wallace at (510) 287-1370.

Sincerely,



Alexander R. Coate

ARC:DW

Attachment

375 ELEVENTH STREET . OAKLAND . CA 94607-4240 . (510) 287-0101
BOARD OF DIRECTORS JOHN A. COLEMAN . KATY FOULKES . ANDY KATZ
DOUG LINNEY . LESA R. MCINTOSH . FRANK MELLON . WILLIAM B. PATTERSON

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Pg #, line #	Recommended Edits	Discussion
Pg. 9, lines 12 - 13	Consider a re-write of this sentence, or at a minimum: “... first step toward achieving the coequal goals is to avoid adverse impacts on the Delta (“covered actions”) or the coequal goals from.”	This sentence is confusing and the parenthetical mention of covered actions appears to be misplaced. The parenthetical appears to equate “adverse impacts on the Delta” with “covered actions.” Suggested edits are to make meaning clear.
Pg. 9, lines 36-38	“...the average volume of water flowing into the Delta has been reduced by approximately 30 percent in the last 100 years <u>as a result of upstream consumptive use, as well as diversions of water for use outside of the watershed.</u> The Delta now has numerous pipes and canals that carry water from east to west in isolation. ”	While it is true that the average Delta inflow has been reduced by approximately 30 %, the “ <i>numerous pipes and canals</i> ”, an apparent reference to the Mokelumne and Hetch Hetchy Aqueducts, are responsible for only a very small fraction of that reduction. The Mokelumne and Hetch Hetchy conveyance systems combined divert a total of only 1.3 % of the water from the watershed. In total, municipal and industrial withdrawals upstream of the Delta contribute to about a 10 % reduction in Delta inflow. Most of the Delta inflow reduction is the result of upstream consumptive use, NOT diversion through “ <i>numerous pipes and canals that carry water from east to west in isolation.</i> ” Suggested edits are accurate and less likely to mislead the reader. Alternatively, we recommend deleting the paragraph.
Pg. 13, lines 22-25	“ <u>The geographic scope of the ecosystem restoration projects and programs identified in the Delta Plan shall be the Delta, except that the Delta Plan may include recommended ecosystem projects outside the Delta that will contribute to achievement of the coequal goals.</u> Because California’s water supply reliability and Delta ecosystem concerns are united in the Delta, the geographic scope of the Delta Plan must include areas that divert water upstream of the Delta and those areas that export water from the Delta. This is virtually the same planning area used for the CALFED Bay-Delta Program. ”	The geographic scope of the Delta Plan as written is not consistent with Section 85302(b). This section of the statute defines the geographic scope of the projects and programs of the Delta Plan as the Delta, but further states that the Delta Plan “may include recommended ecosystem projects outside the Delta that will contribute to achievement of the coequal goals.” The section should be the reference point for the Plan. Lines 23 and 24 of the draft assert that “ <i>the Delta Plan must include areas that divert water upstream of the Delta and those areas that export water from the Delta.</i> ” This is an incorrect statement of the statutory language, and neither section 85302(b) nor the other provisions of the statute that mandate, or even recommend, that all areas that divert water upstream of the Delta be included in the geographic scope of the Delta Plan. Suggested edits ensure consistency with the statute.

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Pg #, line #	Recommended Edits	Discussion
Pg. 13, lines 32-35	Add a paragraph on page 13 that recognizes the provisions of section 85031 and 85032, and specifically notes that the Act is not intended to affect water rights and is not intended to supersede, reduce or otherwise effect existing legal protections, including protections for municipal interests.	While the final sentence in the last paragraph references sections 85020, 85302, 85303, 85304, and 85307 as the authority that the Council has used in determining the scope of the Plan and the areas that it will cover, the discussion of the scope and use of the Plan does not include a similar recognition of the language in section 85031(c) stating that the Sacramento-San Joaquin Delta Reform Act does not supersede, limit, or otherwise modify the applicability of Chapter 10 of Part 2 of Division 2 of the Water Code, or the language in section 85031(d) stating that the Act does not supersede, reduce or otherwise affect existing legal protections, both procedural and substantive, relating to the SWRCB's regulation of diversion and use of water, including, but not limited to, water right priorities, the protection provided to municipal interests, and changes in water rights. The Draft Plan should acknowledge these provisions and should also more explicitly recognize the statements in section 85032 that the Act is not intended to affect state and federal endangered species laws or any water right.
Pg. 37, lines 11-16	<p>Amend lines 11-16 as follows:</p> <p>In addition, a proposed plan, program, or project must have a "significant impact on achievement of one or both of the coequal goals" under Water Code section 85057.5(a)(4). For this purpose, the Council has determined that "significant impact" means a substantial or potentially substantial effect on change in existing conditions that is directly, indirectly, and/or cumulatively caused by a project and that will or may affect the achievement of one or both of the coequal goals or the implementation of government-sponsored flood control programs to reduce risks to people, property, and State interests in the Delta.</p>	According to the statutory language cited on page 36, a covered action is an action that: (1) will occur, in whole or in part, within the boundaries of the Delta or Suisun Marsh; (2) will be carried out, approved, or funded by the state or a local public agency; (3) is covered by one or more provisions of the Delta Plan; and (4) will have a significant impact on achievement of one or both of the coequal goals or the implementation of government-sponsored flood control programs to reduce risks to people, property, and state interests in the Delta. On page 37, lines 11-12, the Draft Plan attempts to elaborate on section 85057.5(a)(4), stating that in order to be a "covered action," a proposed plan, program or project must have a significant impact, which is defined as a "potentially substantial change in existing conditions that is directly, indirectly, and/or cumulatively caused by a project <i>and that will or may affect achievement of one or both of the coequal goals or the</i>

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		<p><i>implementation of government-sponsored flood control programs to reduce risks to people, property, and State interests in the Delta.”</i></p> <p>This two-pronged definition of a covered action is not consistent with the statutory language. The language of section 85057.5(a)(4) makes it clear that an action is a covered action only if it will have a significant impact on achievement of one or both of the coequal goals. It does not matter whether the action itself is significant or is making a substantial change. To meet the requirement of the fourth criterion, the impact of the action on achievement of the coequal goals must be significant before the action can be considered a covered action. Thus, a substantial change in existing conditions that occurs, in whole or in part, within the Delta, is not a covered action if it will have only a minor, insignificant impact on achievement of one of the co-equal goals.</p> <p>There is also nothing in the statutory language in Water Code section 85057.5(a) or sections 85225 – 85225.25 to support the assertion that an action that will have a minor, insignificant impact on achievement of one of the coequal goals will fall within the definition of a covered action solely because of the potential for a cumulative impact on achievement of the coequal goals. This result seems to be implied by the language on line 14, but it is not supported by the statutory language. We note that the legislature specifically included projects with individually limited but cumulatively considerable effects within the statutory language of CEQA (See Pub. Res. Code §21083(b)). Similar language does not appear in the provisions of the Sacramento-San Joaquin Delta Reform Act, and it is thus not appropriate to include this in the language of the Delta Plan.</p>

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Pg. 39, lines 2-12	<p>After line 12, add the following paragraph:</p> <p><u>“The Council will implement a streamlined approach for certification of covered actions that are short-term in nature or have a brief window of opportunity for implementation. The streamlined approach will include a compressed timeframe for any appeals of certifications or a waiver of the appeal process in cases where a transfer has been deemed to be a covered action. A streamlined approach for certification will also be developed to address long-term transfers between contractors of the Central Valley Project and transfers between contractors of the State Water Project that have already been subject to environmental review including the public comment process required under NEPA and/or CEQA.”</u></p>	<p>Transfers that meet the co-equal goal of increased reliability of supply should be encouraged to the extent that the co-equal goal of environmental preservation is not adversely impacted. Current guidelines and approval processes used by the Bureau of Reclamation for transfers involving Central Valley Project facilities and by DWR for transfers involving State Water Project facilities are comprehensive in terms of environmental impact and efficient use of resources. They should not be duplicated through implementation of policies in the Delta Plan.</p>
Pg. 39, lines 38-41	<p>Edit as follows:</p> <p><u>“All covered actions must demonstrate managerial and financial capacity to implement any measures included in the proposed action to promote consistency with the co-equal goals over the long term. Managerial capacity includes ownership and water rights relevant to ensuring that the covered action will not have a significant impact on achievement of one or both of the coequal goals or the implementation of government-sponsored flood control programs to reduce risks to people, property, and state interests in the Delta. Financial capacity includes budgeting, capital improvement planning, and a financing plan relevant to the covered action.”</u></p>	<p>On page 39, the Draft Plan sets forth a requirement that a certification for consistency must set forth a demonstration of managerial and financial capacity to implement the covered action over the long term and that this capacity includes budgeting, capital improvement planning, and a financing plan relevant to the covered action. Recognizing that the purpose of the consistency process is to determine the consistency of the action with the regulatory policies of the Delta Plan, it is not clear how this broad requirement for financing data is necessary or relevant to an examination of consistency.</p>

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Pg. 47, lines 11-12	Amend the problem statement on page 47 to clarify the intent.	The Problem Statement on page 47 states that additional local and regional conservation and water supply development is needed to improve regional self-reliance, but because this is not linked to any policy in the Act, the full extent of this “problem” is not clear and the means of solving are equally unclear. The statement should clarify whether it is referring to a need for local and regional conservation beyond the conservation mandated by Water Code sections 10608.16 – 10608.50. In addition, if the intent is to eventually mandate local and regional conservation beyond the conservation required by the 2009 Water Code amendments, the Plan should cite the statutory basis for including any regulatory policies that would require this action. The Act states in section 85303 that the Delta Plan shall promote statewide water conservation, water use efficiency, and sustainable use of water. The intent to apply requirements exceeding current statutory requirements should be explained.

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Pg. 47, lines 14-22	<p>The following policies (WR P1, WR P2, and WR P3) only apply as regulatory policies as follows are recommendations:</p> <p>A. <u>In determining whether a A covered action involving the export of water out of the Delta, or involving the transfer of water through the Delta, is inconsistent with the Delta Plan, the Council will consider a recipient's region's compliance with Recommendations WR P1, WR P2 and WR P3 only in the context of a recipient's region if the need for that covered action is significantly caused by a recipient region's failure to comply with policies WR P1, WR P2, and/or WR P3.</u></p> <p>B. <u>The Council will consider compliance with Recommendations WR P1, WR P2 and WR P3A in determining whether a A covered action involving the use of water in part or in whole in the Delta is inconsistent with the Delta Plan if the need for that covered action is significantly caused by the water using region's failure to comply with policies WR P1, WR P2, and/or WR P3</u></p> <p>In all other situations, WR P1, WR P2, and WR P3 are recommendations.</p>	<p>On page 48, ADDITIONAL OPTIONS FOR COUNCIL CONSIDERATION, Option B, namely "Convert regulatory policy stated above into a recommendation," is an appropriate and more reasonable approach for addressing water transfers that are covered actions. In many cases, water transfers are short-term in nature (e.g., for only one year during droughts) and implementation of WR P1, WR P2, and WR P3 as policies would be excessively burdensome -- to the extent that beneficial transfers consistent with both of the co-equal goals would be discouraged. To the contrary, transfers that meet the co-equal goal of increased reliability of supply should be encouraged to the extent that the co-equal goal of environmental preservation is not adversely impacted.</p>
Pg. 50, lines 11-29	<p>WR P4 should be modified as follows:</p> <p>The State Water Resources Control Board should <u>update the Bay Delta WQCP standards and</u> develop and establish flows as follows:</p> <p>(a) By June 2, 2014, adopt and implement <u>updated</u> flow objectives for the Delta that are necessary to achieve the coequal goals.</p> <p>(b) By June 2, 2018, develop flow criteria and</p>	<p>While we agree with the need for the development of revised Delta flow standards before the imposition of any new Delta flow related regulations, we believe that it is inappropriate to use the flows in the SWRCB's 2010 report in the interim.</p> <p>We have the following specific concerns regarding the "OPTIONS FOR COUNCIL CONSIDERATION" set forth in lines 21 through 29.</p> <p>Option A, which would establish that the Council will use the flow</p>

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	<p>establish flows for high priority tributaries in the Delta watersheds that are necessary to achieve the coequal goals.</p> <p>(c) Prior to the dates indicated in (a) and (b), <u>the SWRCB's existing Bay-Delta WQCP standards existing Delta flow objectives</u> shall be used to determine consistency with the Delta Plan. <u>By June 30, 2013 the Council will request an update from the State Water Resources Control Board on item (a). fails to act</u> If the SWRCB indicates the dates in (a) or (b) cannot be met by the dates indicated, <u>the Council will consider and may adopt actions into the Delta Plan to achieve progress on the coequal goals in place of the updated flow objectives.</u></p>	<p>criteria identified by the SWRCB in the 2010, is not recommended because the Delta Flow criteria did not balance public interest concerns or consider certain factors that impact public trust resources. Implementation of the coequal goals requires careful balancing of many significant public interest concerns and these flows must be further refined before they can be properly used to satisfy the SWRCB's public trust obligations.</p> <p>Option B is not recommended because it further confuses the scope of actions included within the definition of a "covered action" and the concerns that should be addressed as part of the consistency review process. It is not clear that many actions that would divert, move, or export water from the Delta Watershed would fall within the definition of a covered action, and there should be no presumption of a <u>significant</u> impact on either of the coequal goals. This approach also conflicts with the statutory obligations of the SWRCB to ensure that water is put to maximum beneficial use.</p> <p>Option C, which would have the Council recommend that the SWRCB cease water right approvals, is not recommended because this action may not be consistent with section 85032(i), and it is not clear that the failure to develop justifiable flow standards warrants this action, particularly with regard to the issuance of water rights permits outside of the Delta, which may be beyond the scope of the Council's jurisdiction.</p>
Pg. 92, line 30	<p>RR P6 Add the following bullet point:</p> <ul style="list-style-type: none"> • <u>Protect public health and safety.</u> 	<p>This edit clarifies the importance of public health and safety as one of the goals of the Delta Plan.</p>

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Pg #, line #	Recommended Edits	Discussion
Pg. 95, lines 4 and 8	<p>Line 4 should be modified as follows:</p> <p><u>“... for the regional benefit of participants within the Delta all beneficiaries, including landowners, infrastructure owners, and other entities that benefit from the maintenance of the levees, such as water exporters who rely on the levees to protect water quality.”</u></p> <p>Line 8 should be modified as follows:</p> <p><u>“... and owners of infrastructure and other interests protected by the levees;”</u></p>	<p>EBMUD supports the recommendation to create a Delta Flood Control Assessment District with fee assessment authority (RR R6), and we welcome the opportunity to work with Council staff to further develop details of this recommendation. EBMUD has voluntarily contributed over \$15 million to maintain and improve the levees that protect its aqueducts, as well as many other infrastructure assets. In addition, the Delta levee system would benefit greatly if more beneficiaries participated financially.</p> <p>We believe it is essential to include Delta exporters as beneficiaries of the Delta levee system, and as such they must be included as participants in the Flood Management Assessment Districts.</p>
Pg. 108, line 31	<p>EBMUD agrees with the Guiding Principles and suggests the addition of the following principle:</p> <ul style="list-style-type: none"> • <u>Public benefits must be narrowly defined so as to avoid cross-subsidies between user fee payors or to specific beneficiaries. Any fees collected by means of a public goods charge must be expended solely on clearly defined and quantified public benefits.</u> 	<p>Care must be taken in the use of terms such as “user fees” and “public goods charge”. The cost appropriation and expenditure of funds collected under each is unique and must be carefully considered.</p> <p>A public goods charge could be assigned universally to all users of water and those funds must be allocated to very specific public benefits, including legacy water quality remediation in cases where responsible parties cannot be identified (e.g. abandoned mines), science, and certain ecosystem restoration projects (projects that do not provide benefit to a particular user or entity).</p> <p>Of utmost importance to water users will be the requirement for voter approval of such a charge, including constitutional protections to ensure that the revenues cannot be directed to other, non-related purposes, except by constitutional amendment.</p> <p>Under a separate and distinct “beneficiary pays” system, a user fee should be calculated individually for each user (or user group) dependent on the benefits received by that user (group). Actions</p>

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		<p>that could be funded through specific user fees would include ecosystem restoration projects that provide benefits to a particular user or entity, levee maintenance, watershed protection, and water use efficiency. User fees should be considered for all kinds of beneficiaries, not just water users.</p> <p>We advise caution and restraint in advancing the concept of “stressors pay” as a companion principle to “beneficiary pays.” Mitigation is typically the responsibility of a project proponent pursuant to CEQA or other permitting requirements. Establishing a “stressors pay” system opens up difficult issues such as settling on a baseline, and granting credit for actions already undertaken by a party to mitigate project impacts. Further, it may be more difficult to assign a monetary cost to damage or stress caused by a given activity than it is to quantify a benefit under beneficiary pays. The stressors pay principle should be applied to a very limited set of activities, and should not supplant penalties or permit requirements that are already in regulatory effect.</p>
Pg. 111, line 4	<p>The following language should be inserted at the end of line 4 on page 111:</p> <p><u>“To ensure appropriate cost allocations, it will be necessary for the Bay Delta Conservation Plan to clearly delineate between ecosystem actions and their associated costs that are mitigation measures versus those that are enhancement above and beyond the necessary mitigation.”</u></p>	<p>The Council should advise the BDCP to clearly delineate the distinction between mitigation and enhancement for the ecosystem portion of the BDCP. This is necessary to achieve consistency with the Guiding Principles presented on page 108.</p>

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Pg #, line #	Recommended Edits	Discussion
Pg. 112, lines 27-30	<p>FP R7 should be modified as follows:</p> <p>The Legislature should grant <u>direct</u> the Council the authority to develop for the Legislature's approval reasonable fees for <u>all</u> beneficiaryies, and reasonable fees for those who stress the Delta ecosystem, and apply such fees to the operational costs of the Council, the Delta Conservancy and the Delta Protection Commission to allow implementation of the Delta Plan.</p>	<p>Any fee proposal or system developed by the Council must be subject to approval by the legislature, and all beneficiaries and stressors, not just water users, should be included in the fee proposal.</p> <p>Ideally, the Delta Plan should contain a full cost analysis of its projects, programs, plans, actions, and activities; however, such an analysis is not feasible given the very short timeline for completion of the Plan. The Draft Plan notes that funds from the state and federal governments will be in short supply, but it does not acknowledge the similar financial straits that local and regional governments and agencies, including water agencies, are also experiencing. Funding will be in short supply, regardless of the sources.</p> <p>To help in the review of costs, apportionment or allocation of those costs, and consideration of various revenue generation mechanisms, we strongly suggest that the Council consider the use of a well balanced advisory committee of stakeholders to provide input and recommendations on each of these topics. Varied and substantial input should be expected on these finance topics, and the Council should facilitate broad and constructive input before reaching its ultimate decisions in this area. EBMUD is prepared to take an active role in such a committee, bringing substantial experience on Delta finance issues and successful collaborative efforts with many other water agencies on specific finance issues.</p>
Pg. 113, line 4	<p>"This fund would provide for <u>science and</u> ecosystem costs..."</p>	<p>The Public Goods Charge for water described in FP R10 should also be used to fund science programs that will inform Delta policy and broadly benefit the entire State.</p>

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Pg. 117, lines 28-30	Water marketing fees would be applied to water transfers in the Delta watershed. These fees would be above and beyond any existing watershed diversion or export fees. <u>Such fees shall be commensurate with the State Water Resources Control Board's actual costs in reviewing and approving applications for such transfers.</u> Transfers that do not require State Water Resources Control Board action, including transfers between contractors of the Central Valley Project and between contractors of the State Water Project, shall not be subject to water marketing fees. The State Water Resources Control Board currently collects fees associated with change in water rights required for transfers.	Water marketing fees will discourage beneficial transfers. Transfers that meet the co-equal goal of increased reliability of supply should be encouraged, to the extent that the co-equal goal of environmental preservation is not adversely impacted.
Pg. 118, lines 5 & 6	"These include statewide planning, <u>and</u> ecosystem enhancements, or investments that reduce reliance on imported supplies. "	Any reduced reliance on imported supplies is in fact a benefit to the entity that has achieved such reduced reliance. As such, it should not be an activity that receives funding through a broadly collected public goods charge.